9

Supreme Court, U.S.
FILED
NOV 18 2005
OFFICE OF THE CLERK

No. 05-380

In the Supreme Court of the United States

ALBERTO R. GONZALES, ATTORNEY GENERAL,
Petitioner,

v.

LEROY CARHART, *ET AL.*,
Respondents.

On Petition for Writ of Certiorari to the
United States Court of Appeals for the Eighth Circuit

BRIEF OF TEXAS, ALABAMA, ARKANSAS, COLORADO, FLORIDA, IDAHO, KANSAS, MICHIGAN, MISSOURI, OHIO, PENNSYLVANIA, SOUTH CAROLINA, SOUTH DAKOTA, UTAH, AND VIRGINIA AS *AMICI CURIAE* IN SUPPORT OF PETITIONER

GREG ABBOTT
Attorney General of Texas

BARRY R. MCBEE
First Assistant Attorney General

EDWARD D. BURBACH
Deputy Attorney General for Litigation

R. TED CRUZ
Solicitor General
Counsel of Record

JOEL L. THOLLANDER
Assistant Solicitor General

P.O. Box 12548
Austin, Texas 78711-2548
(512) 936-1700

COUNSEL FOR *AMICI CURIAE*

[Additional counsel listed on inside cover]

TROY KING
Attorney General of Alabama

MIKE BEEBE
Attorney General of Arkansas

JOHN W. SUTHERS
Attorney General of Colorado

CHARLES J. CHRIST, JR.
Attorney General of Florida

LAWRENCE G. WASDEN
Attorney General of Idaho

PHILL KLINE
Attorney General of Kansas

MICHAEL A. COX
Attorney General of Michigan

JEREMIAH W. (JAY) NIXON
Attorney General of Missouri

JIM PETRO
Attorney General of Ohio

THOMAS W. CORBETT, JR.
Attorney General of Pennsylvania

HENRY McMASTER
Attorney General of South Carolina

LAWRENCE E. LONG
Attorney General of South Dakota

MARK L. SHURTLEFF
Attorney General of Utah

JUDITH WILLIAMS JAGDMANN
Attorney General of Virginia

QUESTION PRESENTED

Whether, notwithstanding Congress's determination that a health exception was unnecessary to preserve the health of the mother, the Partial-Birth Abortion Ban Act of 2003 is invalid because it lacks a health exception or is otherwise unconstitutional on its face.

TABLE OF CONTENTS

Question Presented iii

Table of Contents iv

Index of Authorities vi

Interest of *Amici Curiae* 1

Reasons for Granting the Writ 3

I. There Is Confusion in the Lower Courts Concerning Whether *Stenberg* Created a Per Se Constitutional Rule That Every Abortion-Related Regulation Must Contain a Maternal Health Exception. 3

A. *Stenberg* Approached the Necessity of a Maternal Health Exception as a Question of Fact 3

B. Some Lower Courts Have Approached the Necessity of a Maternal Health Exception as a Question of Fact. 5

C. Other Lower Courts Have Concluded That the Inclusion of a Maternal Health Exception Is Now a Per Se Constitutional Requirement 8

D. The Court Should Grant the Petition to Clarify This Issue 9

II. There Is Confusion in the Lower Courts Concerning Whether Language Such as That Employed by the Federal Ban Sweeps Too Broadly under *Stenberg* 11

A. The Federal Ban Was Carefully Crafted to Comport with *Stenberg*'s Requirement of Greater Precision 11

B. One Lower Court Has Held Very Similar Language To Be Clear and Precise 12

C. Other Lower Courts Have Held Similar Language To Be Vague or Insufficiently Precise 13

D. Lower Courts Considering the Federal Ban's Language Are Not in Agreement 15

E. The Court Should Grant the Petition to Confirm That the Language Employed by the Federal Ban is Clear and Precise 17

Conclusion 19

INDEX OF AUTHORITIES

Cases

A Choice for Women v. Butterworth, Nos. 00-182-0CIV,
2000 WL 34403086 (S.D. Fla. July 11, 2000) 15, 17

Carhart v. Ashcroft,
331 F.Supp.2d 805 (D. Neb. 2004) 2, 7, 16, 17

Carhart v. Gonzales, 413 F.3d 791 (CA8 2005) 2, 8

Daniel v. Underwood,
102 F.Supp.2d 680 (S.D.W.Va. 2000) 6

Hodgson v. Minnesota,
497 U.S. 417 (1990) 4

Nat'l Abortion Fed'n v. Ashcroft,
330 F.Supp.2d 436 (S.D.N.Y. 2004) 7

Planned Parenthood Fed'n of Am. v. Ashcroft,
320 F.Supp.2d 957 (N.D. Cal. 2004) 7, 15-17

Planned Parenthood of Northern New England v. Heed,
390 F.3d 53 (CA1 2004), *cert. granted sub nom.*
Ayotte v. Planned Parenthood of Northern New England,
125 S.Ct. 2294 (2005) 9

Planned Parenthood of Se. Pa. v. Casey,
505 U.S. 833 (1992) 4

Planned Parenthood v. Owens,
287 F.3d 910 (CA10 2002) 5

Planned Parenthood v. Wasden, 376 F.3d 908 (CA9 2004) ... 9

Reprod. Health Servs. of Planned Parenthood v. Nixon,
325 F.Supp.2d 991 (W.D. Mo. 2004) 17

Richmond Med. Ctr. for Women v. Hicks,
301 F.Supp.2d 499 (E.D.Va. 2004) 14

Richmond Medical Center for Women v. Hicks,
409 F.3d 619 (CA4 2005) 8, 9, 13, 14, 17

Roe v. Wade,
410 U.S. 113 (1973) 4

Stenberg v. Carhart,
530 U.S. 914 (2000) 1, 3-6, 10, 11, 12, 17

Summit Med. Assocs. v. Siegelman,
130 F.Supp.2d 1307 (M.D. Ala. 2001) 6

Women's Medical Professional Corp. v. Taft,
353 F.3d 436 (CA6 2003) 5, 6, 13, 17

Constitutional Provisions, Statutes, and Rules

18 U.S.C. §1531 2

18 U.S.C. §1531(b)(1)(A) 12

ALA. CODE §§26-23-1 to -6 1

ALASKA STAT. §18.16.050 1

ARIZ. REV. STAT. §13-3603.01 1

ARK. CODE ANN. §§5-61-202, -203 1

FLA. STAT. ANN. §§390.011 1

FLA. STAT. ANN. §§782.32 – .36 ..... 1, 17

GA. CODE ANN. §16-12-144 1

IDAHO CODE ANN. §18-613 1

720 ILL. COMP. STAT. 513/10 1

IND. CODE ANN. §16-18-2-267.5 1

IND. CODE ANN. §16-34-2-1 1

IOWA CODE ANN. §707.8A 1

KAN. STAT. ANN. §65-6721 1

KY. REV. STAT. ANN. §§311.720, .765 1

LA. REV. STAT. ANN. §14:32.9 1

MICH. COMP. LAWS ANN. §333.17016 1

MISS. CODE ANN. §41-41-73 1

MO. REV. STAT. §565.300 ..... 1, 17

MONT. CODE ANN. §§50-20-102, -401 1

N.D. CENT. CODE §§14-02.6-01 to -03 ..... 1, 17

N.H. REV. STAT. ANN. §§132:24 to :28 10

N.J. STAT. ANN. §2A:65A-6 1

N.M. STAT. ANN. §§30-5A-1 to -5 1

NEB. REV. STAT. §§28-326, -328 ..... 1, 11

OHIO REV. CODE ANN. §2919.151 ..... 1, 12, 17

OKLA. STAT. tit. 21, §684 1

R.I. GEN. LAWS §§23-4.12-1 to -6 1

S.C. CODE ANN. §44-41-85 1

S.D. CODIFIED LAWS §34-23A-27 1

TENN. CODE ANN. §39-15-209 1

UTAH CODE ANN. §§76-7-301, -326 ..... 1, 17

VA. CODE ANN. §18.2-74.2 ..... 1, 17

W.VA. CODE ANN. §§33-42-3, -8 1

WIS. STAT. §940.16 1

Other Authorities

Partial-Birth Abortion Ban Act of 2003,
Pub. L. No. 108-105, 117 Stat. 1201 (2003) 2, 12

Partial-Birth Abortion Ban Act of 2003: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary, 108th Cong. 26 (2003) 10

INTEREST OF *AMICI CURIAE*

The state *amici curiae*, through their Attorneys General, respectfully submit this brief in support of the petition for a writ of certiorari. This appeal raises abortion-related issues of substantial importance to the States on which the lower courts are divided. Although the petition concerns the constitutionality of the federal government's ban on partial-birth abortion, regulation of abortion-related conduct is also a state activity, and there is a widespread state interest in banning partial-birth abortion. In the last eight years, thirty-one States have passed partial-birth abortion legislation.[1]

Many of these state statutes were invalidated or rendered unenforceable following the Court's decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000), which struck down Nebraska's partial-birth abortion ban on two grounds: that the ban was written too broadly, and that it lacked a health exception when substantial authority supported the medical necessity of the banned procedure. *Id.*, at 937-38, 945-46.

---

1. *See* ALA. CODE §§26-23-1 to -6; ALASKA STAT. §18.16.050; ARIZ. REV. STAT. §13-3603.01; ARK. CODE ANN. §§5-61-202, -203; FLA. STAT. ANN. §§390.011, 782.32 – .36; GA. CODE ANN. §16-12-144; IDAHO CODE ANN. §18-613; 720 ILL. COMP. STAT. 513/10; IND. CODE ANN. §§16-34-2-1, 16-18-2-267.5; IOWA CODE ANN. §707.8A; KAN. STAT. ANN. §65-6721; KY. REV. STAT. ANN. §§311.720, .765; LA. REV. STAT. ANN. §14:32.9; MICH. COMP. LAWS ANN. §333.17016; MISS. CODE ANN. §41-41-73; MO. REV. STAT. §565.300; MONT. CODE ANN. §§50-20-102, -401; NEB. REV. STAT. §§28-326, -328; N.J. STAT. ANN. §2A:65A-6; N.M. STAT. ANN. §§30-5A-1 to -5; N.D. CENT. CODE §§14-02.6-01 to -03; OHIO REV. CODE ANN. §2919.151; OKLA. STAT. tit. 21, §684; R.I. GEN. LAWS §§23-4.12-1 to -6; S.C. CODE ANN. §44-41-85; S.D. CODIFIED LAWS §34-23A-27; TENN. CODE ANN. §39-15-209; UTAH CODE ANN. §§76-7-301, -326; VA. CODE ANN. §18.2-74.2; W. VA. CODE ANN. §§33-42-3, -8; WIS. STAT. §940.16.

In the Partial-Birth Abortion Ban Act of 2003, Congress addressed both of the Court's concerns in *Stenberg*: Congress wrote a more precise ban, and it conducted extensive hearings before determining that the abortion method it had banned would never be medically necessary. *See* Partial-Birth Abortion Ban Act of 2003, Pub. L. No. 108-105, 117 Stat. 1201 (2003) (to be codified at 18 U.S.C. §1531).

The court of appeals struck down the federal law, holding that *Stenberg* "establishes a per se constitutional rule in that the constitutional requirement of a health exception applies to all abortion statutes, without regard to precisely how the statute regulates abortion." *Carhart v. Gonzales*, 413 F.3d 791, 796 (CA8 2005). The district court also held that, notwithstanding the greater precision with which the federal statute was written, it remained unconstitutionally broad under *Stenberg*. *See Carhart v. Ashcroft*, 331 F.Supp.2d 805, 1037 (D. Neb. 2004).

The lower courts are divided on the question whether the Court's opinion in *Stenberg* established a new, per se health-exception requirement for all abortion-related regulation. There is also considerable confusion concerning whether language such as that employed by the federal partial-birth abortion ban—and also employed by a number of more recent state statutes—sweeps too broadly, or is impermissibly vague, in light of the Court's holding in *Stenberg*. The *amici* States have a substantial interest in drafting abortion-related laws that comport with constitutional requirements, and would welcome clarification from the Court with respect to these issues. The *amici* States further believe that this appeal provides an excellent vehicle for the Court's consideration and resolution of these important questions, and therefore urge the Court to grant the petition for writ of certiorari.

REASONS FOR GRANTING THE WRIT

The Court's decision in *Stenberg* turned on two central holdings. First, the Court held that a statute prohibiting certain methods of abortion must contain a health exception "where substantial medical authority supports the proposition that banning [that] particular abortion procedure could endanger women's health." 530 U.S., at 938. Because the "medically related evidentiary circumstances" before the Court demonstrated the need for a maternal health exception to Nebraska's partial-birth abortion ban, its failure to include one was a constitutional defect. *Id.*, at 936-37. Second, the Court held that Nebraska's ban constituted an undue burden on a woman's abortion decision because, as written, it covered not only partial-birth abortions, but also "the most commonly used method for performing previability second trimester abortions." *Id.*, at 945-46.

The lower courts are divided on the proper application of both of *Stenberg*'s holdings, and the Court should take this opportunity to clear up the persisting confusion.

I. THERE IS CONFUSION IN THE LOWER COURTS CONCERNING WHETHER *STENBERG* CREATED A PER SE CONSTITUTIONAL RULE THAT EVERY ABORTION-RELATED REGULATION MUST CONTAIN A MATERNAL HEALTH EXCEPTION.

A. *Stenberg* Approached the Necessity of a Maternal Health Exception as a Question of Fact.

The Court in *Stenberg* did not hold that every abortion-related regulation must contain an exception for the preservation of maternal health. And the Court's analysis in that case demonstrates that it did not view the Nebraska statute's lack of a maternal health exception as a per se constitutional infirmity. *See id.*, at 931-38.

Nebraska argued to the Court that "the law does not require a health exception unless there is a need for such an exception. And

[with respect to Nebraska's statute,] there is no such need." *Id.*, at 931. In response, the Court did not take issue with Nebraska's formulation of the relevant legal rule; instead it noted that the "problem for Nebraska is that the parties strongly contested *this factual question* in the trial court below; and the findings and evidence," in the Court's judgment, demonstrated that there was a need for a health exception to Nebraska's ban. *Id.*, at 931-32 (emphasis added).

The Court in *Stenberg* also explained that requiring Nebraska's statute to contain an exception for the preservation of maternal health was no departure from the Court's earlier decision in *Planned Parenthood of Se. Pa. v. Casey*, 505 U.S. 833 (1992), but was instead "simply a straightforward application" of that precedent. *Stenberg*, 530 U.S., at 938. *Casey*, in turn, affirmed the central holding of *Roe v. Wade*, 410 U.S. 113 (1973), but rejected *Roe*'s trimester framework and the strict scrutiny that had previously been applied to abortion-related regulations because that scrutiny undervalued the States' important and legitimate interests in the life of the fetus. *Casey*, 505 U.S., at 871-73 (joint opinion). And, relevant to the issue here, *Casey* cited approvingly to *Hodgson v. Minnesota*, 497 U.S. 417 (1990), in which the Court had upheld a statute requiring minors to notify their parents before undergoing an abortion, notwithstanding the fact that the statute did not contain an explicit health exception. *See Casey*, 505 U.S., at 874 (joint opinion); *Hodgson*, 497 U.S., at 426.

Thus, prior to *Stenberg*, the Court had not treated a maternal health exception as a per se constitutional requirement for every abortion-related regulation. And in *Stenberg* itself, the Court engaged in a careful analysis of the factual record before determining that the "medically related evidentiary circumstances" demonstrated a need for a health exception to Nebraska's ban. 530 U.S., at 937. This analysis of the "findings and evidence," *id.*, at 932, would have been entirely unnecessary had the Court imposed

a per se requirement that statutes regulating abortion must contain an express health exception. And, given the Court's explicit assertion that *Stenberg*'s holding "does not go beyond" the Court's previous abortion-related decisions, *id.*, at 931, there appears to be no sound basis upon which to conclude that in *Stenberg* the Court established a new, per se constitutional rule that every abortion-related regulation must contain a health exception. Even so, the lower courts are confused on this issue.

B. Some Lower Courts Have Approached the Necessity of a Maternal Health Exception as a Question of Fact.

In *Planned Parenthood v. Owens*, 287 F.3d 910 (CA10 2002), the Tenth Circuit understood *Stenberg* to require a factual determination concerning the necessity of a maternal health exception to a particular abortion regulation. As the court of appeals explained, under *Stenberg* the "proper analysis is thus to determine whether a health exception is necessary given the restrictions imposed by" the regulation at issue. *Id.*, at 918 n.7. "[B]ased on the facts conceded by the State and contained in the record," the court of appeals concluded that a health exception was necessary to Colorado's parental-notification statute. *Id.*

The Sixth Circuit took a similar approach in *Women's Medical Professional Corp. v. Taft*, 353 F.3d 436 (CA6 2003). Although the Ohio statute at issue in *Taft* contained a maternal health exception, the court of appeals's analysis reflected an understanding that the constitutional requirement for such an exception is linked with a factual determination of its medical necessity: "[t]aken together, *Casey* and *Carhart* stand for the proposition that states may restrict an abortion procedure except when the procedure is necessary to prevent a significant health risk." *Id.*, at 446. "In notable contrast to the plaintiffs in *Casey*," the court of appeals continued, "the plaintiffs here do not even attempt to identify any specific medical

circumstance that demonstrates the inadequacy of Ohio's maternal health exception." *Id.*, at 450.[2]

In addition to these courts of appeals decisions, a number of district courts have also, post-*Stenberg*, approached the necessity of a maternal health exception to an abortion-related regulation as turning on a question of fact. In *Daniel v. Underwood*, 102 F.Supp.2d 680, 684-85 (S.D.W.Va. 2000), the district court reviewed and examined the evidence submitted by the parties before concluding that West Virginia's partial-birth abortion ban created "a significant health risk" and therefore had to provide a health exception. Similarly, in *Summit Med. Assocs. v. Siegelman*, 130 F.Supp.2d 1307, 1314 (M.D. Ala. 2001), the district court struck down an Alabama partial-birth abortion prohibition only after explaining that "[t]here is no evidence in the record to suggest that Alabama abortion practices differ from the [*Stenberg*] findings in any way that would lead to a different conclusion under the health-exception rule about the necessity of partial-birth abortions in certain circumstances according to appropriate medical judgment."

Three separate district courts have addressed the constitutionality of the federal partial-birth abortion ban at issue in this appeal, and each court has proceeded under the assumption that determining whether the statute requires a maternal health exception depends on some showing of medical necessity. The

---

2. The court of appeals's decision in *Taft* generated a dissent, but the dissenting judge shared the majority's basic understanding of *Stenberg*'s holding on this issue: "[g]iven the foregoing constitutional standard, it is necessary to consider whether 'a significant body of medical opinion believes [that the regulated procedure] may bring with it greater safety for some patients, and explains the medical reasons supporting that view.'" *Taft*, 353 F.3d, at 458 (Tarnow, D.J., dissenting) (quoting *Stenberg*, 530 U.S., at 937).

district court in *Nat'l Abortion Fed'n v. Ashcroft*, 330 F.Supp.2d 436, 442, 482 (S.D.N.Y. 2004), determined that the federal ban required a health exception because the evidence submitted during a sixteen-day bench trial demonstrated that "a significant body of medical opinion" supported the proposition that without such an exception the ban would endanger a mother's health. Likewise, in *Planned Parenthood Fed'n of Am. v. Ashcroft*, 320 F.Supp.2d 957, 1012-13, 1033 (N.D. Cal. 2004), the district court reasoned that "*Stenberg*'s health exception requirement does not appear to arise to the level of a constitutional 'rule' like *Miranda* requirements" and therefore found it necessary to examine the record before determining that "significant medical authority supports the proposition" that a health exception was medically necessary.

And the district court in this case invalidated the federal partial-birth abortion ban for lack of a maternal health exception only after weighing evidence presented during the course of a two-week trial. *See Carhart v. Ashcroft*, 331 F.Supp.2d 805 (D. Neb. 2004). Indeed, the district court could not have viewed a maternal health exception as a per se constitutional requirement, given that it explicitly refused to declare the federal statute unconstitutional with respect to post-viability abortions because "[t]here was little or no evidence presented to [the court] on what really happens during this gestational stage. Moreover, none of the plaintiff-doctors perform abortions on fetuses that are obviously viable in order to preserve the health, as opposed to the life, of women." *Id.*, at 1003. Without a developed factual record upon which to determine whether a maternal health exception was necessary in these circumstances, the court "decline[d] to determine whether the law is constitutional or unconstitutional" post-viability. *Id.*

C. Other Lower Courts Have Concluded That the Inclusion of a Maternal Health Exception Is Now a Per Se Constitutional Requirement.

In contrast to the approach taken by the Sixth and Tenth Circuits, and by the district courts in Alabama, California, Nebraska, New York, and West Virginia, federal courts of appeals in the First, Fourth, Eighth, and Ninth Circuits have concluded that *Stenberg* created a new, per se constitutional requirement that every abortion-related regulation must contain an explicit maternal health exception.

For example, contrary to the district court below, the court of appeals in the instant case held that "*Stenberg* establishes a per se constitutional rule in that the constitutional requirement of a health exception applies to all abortion statutes, without regard to precisely how the statute regulates abortion." *Carhart v. Gonzales*, 413 F.3d, at 796. In so holding, the Eighth Circuit in turn cited approvingly the Fourth Circuit decision in *Richmond Medical Center for Women v. Hicks*, 409 F.3d 619 (CA4 2005).

In *Hicks*, the Fourth Circuit addressed the constitutionality of a Virginia law banning "partial-birth infanticide" that did not contain an explicit maternal health exception. The court noted that "[t]he Commonwealth argues that summary judgment was improper because the plaintiffs did not present substantial medical authority for the proposition that a health exception is needed in this particular statute. The district court concluded otherwise, but that is beside the point. For [*Stenberg*] established the health exception requirement as a *per se* constitutional rule." *Id.*, at 625.[3]

---

3. Judge Niemeyer dissented from the majority's holding in *Hicks*, arguing that "[n]othing in [*Stenberg*] . . . indicated that the Court was creating a *per se* constitutional rule or that every abortion statute, regardless of whether it targets methods of abortion or the life of the fetus

The opinion of the Fourth Circuit in *Hicks* and the opinion of the Eighth Circuit in this case both also referenced the Ninth Circuit decision in *Planned Parenthood v. Wasden*, 376 F.3d 908 (CA9 2004), *cert. denied*, 125 S.Ct. 1694 (2005). In that case, involving an Idaho statute that required a minor to obtain parental consent before undergoing an abortion, the court of appeals observed that "[a]ny abortion regulation must contain adequate provision for a woman to terminate her pregnancy if it poses a threat to her life or health." *Id.*, 376 F.3d, at 922. The court's subsequent characterization of that observation, however, took a further analytical leap: "[a]n adequate health exception, that is, is a *per se* constitutional requirement." *Id.*

The First Circuit has also sided with the Fourth, Eighth, and Ninth Circuits on this issue. In *Planned Parenthood of Northern New England v. Heed*, 390 F.3d 53, 59 (CA1 2004), *cert. granted sub nom. Ayotte v. Planned Parenthood of Northern New England*, 125 S.Ct. 2294 (2005), the court of appeals held that *Stenberg* established a per se constitutional rule that reached even a statute requiring parental notification prior to a minor's abortion. As the court summarized its conclusion: "a statute regulating abortion must contain a health exception in order to survive constitutional challenge." *Heed*, 390 F.3d, at 59.

D. The Court Should Grant the Petition to Clarify This Issue.

The question whether every abortion-related regulation must contain a maternal health exception is not merely academic. Under *Stenberg*, when "the absence of a health exception will place women at an unnecessary risk of tragic health consequences," then

---

or some other state interest, must contain a clause that provides for the protection of the mother's health." *Hicks*, 409 F.3d, at 631-32 (Niemeyer, J., dissenting).

an abortion-related regulation must contain such an exception. 530 U.S., at 937. But when an abortion-related regulation does not create substantial health risks for the mother, there is real concern that including an unnecessary health exception could undermine the regulation's effectiveness.

The majority and the dissenting opinions in *Stenberg* recognized the potential consequences of an unnecessary or overly broad health exception. *See id.*, at 938; *id.*, at 967-69 (Kennedy, J., dissenting); *id.*, at 1011-13 (Thomas, J., dissenting). Congress received testimony to similar effect when considering the federal partial-birth abortion ban. *See, e.g., Partial-Birth Abortion Ban Act of 2003: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 108th Cong. 26 (2003) (statement of Gerard V. Bradley, Professor of Law, Univ. of Notre Dame).[4] Many States share this concern.

Although a related question is before the Court in *Ayotte*, the *amici* States urge the Court to grant certiorari in this case as well. *Ayotte* concerns the constitutionality of a New Hampshire statute requiring parental notification prior to a minor's abortion. Although New Hampshire's statute contains no express exception for maternal health, it provides for a judicial bypass of its requirements in such situations. *See* N.H. REV. STAT. ANN. §§132:24 to :28. The Court's determination of that statute's constitutionality thus may not resolve the confusion with respect to health-exception requirements in the partial-birth abortion context. Consideration of both cases in the same Term could aid the Court

---

4. "I understand the logic of the draftsmanship here, and that is the fear, which I think to be reasonable and well grounded, that if there is a health exception engrafted or put into this bill, then the prohibition itself would become toothless and ineffective in light of the fact, if it is the fact, that there are no cases of genuine health necessity or medical necessity. It would seem to me that a health exception would be mischievous." *Id.*

in crafting the appropriate rule, and would ensure that the States receive much-needed guidance with respect to drafting constitutional partial-birth abortion bans.

II. THERE IS CONFUSION IN THE LOWER COURTS CONCERNING WHETHER LANGUAGE SUCH AS THAT EMPLOYED BY THE FEDERAL BAN SWEEPS TOO BROADLY UNDER *STENBERG*.

A. The Federal Ban Was Carefully Crafted to Comport with *Stenberg*'s Requirement of Greater Precision.

The Court's second holding in *Stenberg* was that Nebraska's partial-birth abortion ban constituted an undue burden on a woman's abortion decision because, as written, it covered not only partial-birth abortions, but also the so-called "D&E" abortion procedure—"the most commonly used method for performing previability second trimester abortions." 530 U.S., at 945-46.

Nebraska's ban forbade "deliberately and intentionally delivering into the vagina a living unborn child, or a substantial portion thereof, for the purpose of performing a procedure that the person performing such procedure knows will kill the unborn child." NEB. REV. STAT. §28-326(9). In finding this ban too broad, the Court focused on the term "substantial portion," noting that with this language the ban could easily be read to cover the D&E procedure, "where a foot or arm is drawn through the cervix" before the fetus is killed. *Stenberg*, 530 U.S., at 939. As the Court explained, "[e]vidence before the trial court makes clear that D&E will often involve a physician pulling 'a substantial portion' of a still living fetus, say, an arm or leg, into the vagina prior to the death of the fetus." *Id.* Consequently, physicians using that method "must fear prosecution, conviction, and imprisonment. The result is an undue burden upon a woman's right to make an abortion decision." *Id.*, at 945-46.

Congress responded to the Court's concern by drafting the federal ban with far greater precision. The federal prohibition is

triggered only when, among other requirements, "in the case of a head-first presentation, the entire fetal head is outside the body of the mother, or, in the case of breech presentation, any part of the fetal trunk past the navel is outside the body of the mother." Pub. L. No. 108-105, §3, 117 Stat. 1201, 1206-1207 (2003) (to be codified at 18 U.S.C. §1531(b)(1)(A)). This language is both clear and precise—it cannot reasonably be read to cover the more common D&E procedure in which "a foot or arm is drawn through the cervix" before the fetus is killed. *See Stenberg*, 530 U.S., at 939. Consequently, physicians using the D&E abortion method should have no cause to fear prosecution under the statute, and the statute's anticipated affect on physicians should provide no ground for finding the ban unconstitutional. *See id.*, at 945-46.

Unfortunately, the lower courts' treatment of the new federal ban's more precise language—and of substantially similar language in a number of state statutes—has not been uniform. An Ohio statute using remarkably similar terms has been upheld, while a Virginia statute with language virtually identical to the federal ban has been struck down. And two of the courts that have addressed the federal statute are not in agreement: one holds that the language is clear and understandable; another that it is impermissibly vague.

B. One Lower Court Has Held Very Similar Language To Be Clear and Precise.

In 2000, the Ohio Legislature passed a law banning "partial birth feticide." OHIO REV. CODE ANN. §2919.151(D). Ohio's approach to the "substantial portion" problem identified in *Stenberg* was much like the approach later adopted by Congress: as with the federal ban, Ohio's prohibition is only triggered by, among other required elements,

> "[i]n a breech presentation, intentional extraction of at least the lower torso to the navel, but not the entire body, of an intact fetus from the body of the mother, or in a

> cephalic presentation, intentional extraction of at least the complete head, but not the entire body, of an intact fetus from the body of the mother." *Id.*, §2919.151(A)(3)(b).

Ohio's ban faced constitutional challenge, but the Sixth Circuit upheld the law in *Women's Medical Professional Corp. v. Taft*, 353 F.3d 436, 453 (CA6 2003). Although the Ohio statute contained a number of additional qualifications that factored into the court of appeals's analysis, the court found the passage quoted above both to be clear and sufficiently precise. *See id.*, at 452-53. Thus, the ban on partial-birth feticide did "not impose an undue burden on a woman's right to abort a non-viable fetus." *Id.*, at 453. As the court concluded, "[w]e therefore have no difficulty fulfilling our twin obligations to give effect, if possible, to every clause and word of a statute, . . . and to construe statutes, when possible, so as to avoid constitutional difficulties." *Id.* (citations and internal quotations omitted).

C. Other Lower Courts Have Held Similar Language To Be Vague or Insufficiently Precise.

Virginia's similar 2003 ban on "partial-birth infanticide" did not fare as well in the Fourth Circuit. Using language almost identical to that employed by the federal ban, Virginia's statute provides that,

> "[f]or purposes of this section, 'substantially expelled or extracted from its mother' means, in the case of a headfirst presentation, the infant's entire head is outside the body of the mother, or, in the case of breech presentation, any part of the infant's trunk past the navel is outside the body of the mother." VA. CODE ANN. §18.2-71.1(D).

When suit was brought against Virginia's partial-birth infanticide ban, both the district court and the Fourth Circuit found the ban unconstitutional. *See Richmond Med. Ctr. for Women v. Hicks*, 409 F.3d 619, 629 (CA4 2005). Although the court of

appeals rested its judgment only on the statute's lack of a maternal health exception, *see id.*, the district court found the statute's language to be both unduly broad and impermissibly vague, *see Richmond Med. Ctr. for Women v. Hicks*, 301 F.Supp.2d 499, 513-17 (E.D.Va. 2004).

Notwithstanding the precision with which the ban was drafted, the district court held that it placed an undue burden on a woman's abortion decision because "[t]he plain language of the Act bans pre-viability D&E's." *Id.*, at 515. The district court further found that the Virginia statute was unconstitutionally vague, noting that "[s]everal of the terms in the Act are especially ambiguous: 'from its mother,' 'from the body of the mother,' 'outside the body of the mother,' and 'involving dismemberment of the fetus prior to removal from the body of the mother.'" *Id.*, at 517.[5]

The Florida Legislature's 2000 amendment to its partial-birth abortion ban—containing similar language—met with a similar fate in federal court. With terms echoing those employed by the Virginia and Ohio bans, the Florida statute provides:

> "[a]s used in this act, the term: (1) 'Partially born' means the living fetus's intact body, with the entire head attached, is presented so that: (a) There has been delivered past the mother's vaginal opening: 1. The fetus's entire head, in the case of a cephalic presentation, up until the point of complete separation from the mother whether or not the placenta has been delivered or the umbilical cord

---

5. In his dissent to the court of appeals's decision affirming the district court's judgment, Judge Niemeyer argued that the Virginia statute was written with sufficient precision and clarity: "[n]ot only is it hard to imagine how a person of normal intelligence would not understand those everyday words, but the record demonstrates that [the complaining doctor] himself did not find them ambiguous." *Hicks*, 409 F.3d, at 642 (Niemeyer, J., dissenting).

> has been severed; or 2. Any portion of the fetus's torso above the navel, in the case of a breech presentation, up until the point of complete separation from the mother whether or not the placenta has been delivered or the umbilical cord has been severed . . . ." FLA. STAT. ANN. §782.32.

Upon constitutional challenge, the district court held that the ban containing this painstakingly detailed definition created an unconstitutional undue burden on a woman's abortion decision because, in the court's judgment, the ban as written constituted a "sweeping prohibition of at least five currently practiced abortion procedures, including D&E." *A Choice for Women v. Butterworth*, Nos. 00-182-0CIV, 2000 WL 34403086, at *3 (S.D. Fla. July 11, 2000).

D. Lower Courts Considering the Federal Ban's Language Are Not in Agreement.

The district court for the Northern District of California recognized that, in the Partial-Birth Abortion Ban Act of 2003, Congress had described the banned procedure with much greater precision than had Nebraska in the ban that the Court struck down in *Stenberg*. *See Planned Parenthood Fed'n of Am. v. Ashcroft*, 320 F.Supp.2d 957, 970-71 (N.D. Cal. 2004) (contrasting, among other differences, the Nebraska ban's "substantial portion" language with the federal statute's more precise "entire fetal head" and "any part of the fetal trunk past the navel").

Nevertheless, the court concluded "that despite linguistic differences between the Nebraska statute in *Stenberg* and the" federal ban, the federal law was still written too broadly because it covered, in addition to partial-birth abortion procedures, "other previability D&E procedures and possibly inductions as well, in violation of the Supreme Court's holding" in *Stenberg*. *Ashcroft*, 320 F.Supp.2d, at 971, 973-74.

The court also found the statute unconstitutionally vague, highlighting as ambiguous the terms "partial-birth abortion," "overt act," "deliberately and intentionally," and "living fetus." *Id.*, at 976-77. According to the district court in California, many physicians performing abortions would "not understand exactly what the Act prohibits." *Id.*, at 977.

In the instant case, the district court also concluded that the federal partial-birth abortion ban, as written, could reach some "standard D&E abortions of the kind performed by doctors like Dr. Carhart." *Carhart v. Ashcroft*, 331 F.Supp.2d 805, 1037 (D. Neb. 2004).[6] It therefore held the ban invalid under *Stenberg* on that ground. *Id.*, at 1031.

In contrast to the district court in California, however, the district court here did not find the terms employed by the federal statute to be impermissibly vague. *Id.*, at 1040-41. Instead, the district court expressly found that "the evidence reveals that most of the time, doctors have a practical understanding of commonplace words like 'living' and 'past the navel.' In addition, the plaintiffs have failed to cite any cases . . . holding that standard statutory terms of art (such as 'overt act,' 'deliberately and intentionally,' and 'in or affecting interstate commerce') are constitutionally vague." *Id.*

---

6. As the court explained: "[g]iven his specific intent at the inception of the procedure, if Dr. Carhart separates the living fetus into two or more pieces when the intact fetal body past the navel has been delivered outside the woman's body, he violates the law even though he has not delivered an intact fetus, but, on the contrary, has performed a standard D&E." *Id.*

E. The Court Should Grant the Petition to Confirm That the Language Employed by the Federal Ban is Clear and Precise.

In *Stenberg* the Court indicated that a partial-birth abortion ban with a more precise definition of the prohibited procedure could "avoid the constitutional problem" created by the Nebraska statute's reference to the delivery of a "substantial portion" of a living fetus. *Stenberg*, 530 U.S., at 939, 944. In its 2003 ban, Congress attempted to avoid this constitutional problem by providing a clear and precise definition of the prohibited procedure. At least six States have enacted partial-birth abortion bans employing substantially similar language. *See* FLA. STAT. ANN. §782.32; MO. REV. STAT. §565.300; N.D. CENT. CODE §14-02.6-01; OHIO REV. CODE ANN. §2919.151; UTAH CODE ANN. §76-7-301; VA. CODE ANN. §18.2-74.2.

Of these, one ban has been upheld, *see Taft*, 353 F.3d, at 453 (upholding Ohio's ban), and three have been struck down, *see Butterworth*, 2000 WL 34403086, at *3 (invalidating Florida's ban); *Reprod. Health Servs. of Planned Parenthood v. Nixon*, 325 F.Supp.2d 991, 994-95 (W.D. Mo. 2004) (invalidating Missouri's ban); *Hicks*, 409 F.3d, at 629 (invalidating Virginia's ban).[7] Lower courts are also divided over whether the terms employed by these statutes are understandable or impermissibly vague. *See Ashcroft*, 320 F.Supp.2d, at 977 (finding that physicians would not understand language in the federal ban); *Carhart*, 331 F.Supp.2d, at 1040-41 (finding that physicians would understand language in the federal ban).

---

7. When suit was brought against the 2004 amendments to Utah's partial-birth abortion ban, the state defendants stipulated to the entrance of a temporary restraining order based on the Utah statute's substantial similarity to the federal and Virginia laws that had recently been enjoined. The North Dakota ban has not to date been challenged.

The confusion in the lower courts on this issue greatly exacerbates the already difficult task facing state legislatures attempting to draft partial-birth abortion bans that will survive federal-court challenge. The *amici* States urge that the Court resolve the question of whether the Partial-Birth Abortion Ban Act of 2003 is written with sufficient clarity and precision to avoid the undue-burden problem identified in *Stenberg*, and therefore urge the Court to grant certiorari in this case.

CONCLUSION

The Court should grant the petition for writ of certiorari.

Respectfully submitted,

GREG ABBOTT
Attorney General of Texas

BARRY R. MCBEE
First Assistant Attorney General

EDWARD D. BURBACH
Deputy Attorney General, Litigation

R. TED CRUZ
Solicitor General
Counsel of Record

JOEL L. THOLLANDER
Assistant Solicitor General

P.O. Box 12548
Austin, Texas 78711-2548
(512) 936-1700

COUNSEL FOR *AMICI CURIAE*

November 2005